No.83-1049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI,

Petitioners,

v.

BACHE HALSEY STUART
SHIELDS INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO
SUPREME COURT RULE 28.1

The following are parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent Prudential-Bache Securities Inc. (formerly known as Bache Halsey Stuart Shields Incorporated):

The Prudential Insurance Company of America
PRUCO, Inc.
Prudential Capital and Investment Services Inc.
Bache Group Inc.
Prudential-Bache Leasing Inc.
Prudential-Bache Commodity Management Company, Inc.
Bache Securities Inc.
Bache Commodities Ltd.
Bache Guinness Mahon Futures Limited
Prudential-Bache Metal Co. Inc.
Bache Precious Metals, Inc.
Prudential-Bache Energy Corp.
Prudential-Bache Latin America Inc.
Prudential-Bache Southern Europe Inc.
Prudential-Bache Properties, Inc.
Halsey Stuart Corporate Services Limited
Bache Halsey Stuart Shields Holding Corporation
Prudential-Bache Agriculture Inc.
Bache Insurance Agency of Louisiana, Inc.
Bache Insurance Agency of Nevada, Inc.
Prudential-Bache Energy Production Inc.
P-B Finance Ltd.
Prudential-Bache Venture Capital Inc.
Bache Insurance Agency of Arkansas, Inc.
R & D Funding Corp.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the New York courts have personal jurisdiction, consistent with the due process clause of the Fourteenth Amendment of the United States Constitution and this Court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), over Petitioners, Mexican citizens, who:

(i) voluntarily and vigorously pressed to trial in New York State court their claims for affirmative relief against Respondent, even seeking leave to commence an action as plaintiffs in federal court in New York;

(ii) in connection with opening the securities and commodities account in dispute, asked Respondent to rely on their pre-existing relationship with Chase Manhattan Bank in New York City so that Respondent would (and did) extend credit to them in New York City;

(iii) to open that account, signed (a) an agreement in which they agreed the account would be "governed by the laws of the State of New York" and (b) other documents addressed to Respondent's New York City headquarters;

(iv) through their account, knowingly traded on securities and commodities exchanges located in New York City;

(v) maintained substantial and "active" bank and securities accounts with other financial institutions in New York City and personally came to New York City to deal with those accounts; and

(vi) offered funds in the Chase Manhattan Bank account in New York City in partial satisfaction of the debt which Respondent seeks to recover in this action?

2. Is a grant of certiorari provident to review the decision of a state court, where:

(i) reversal would not change the result below, as there is an adequate and independent state law basis for jurisdiction; and

(ii) there are no "special and important reasons" for granting a writ because: (a) as Petitioners concede, the dispute here is essentially factual; (b) there is no conflict between the decision below and any known federal court of appeals decision or decision of any other state court of last resort; (c) there is no unique question of federal law to be settled by this court; and (d) the decision below is not in conflict with applicable decisions of this Court?

TABLE OF CONTENTS

Page

Appendix

TABLE OF AUTHORITIES

(continued)

Cases — Page

(continued)

Cases — Page

Statutes and Rules

RESTATEMENT OF THE CASE

Petitioners' statement of the case requires correction for it fails to acknowledge the following relevant aspects of the case:

Petitioners were not required to assert their claims for affirmative relief against Respondent Prudential-Bache Securities Inc. (sued herein as Bache Halsey Stuart Shields Incorporated) in New York, yet they vigorously pressed those claims both in pre-trial motion practice and at trial, even seeking to have this action removed to the United States District Court for the Southern District of New York to avoid dismissal of claims asserted under those provisions of the federal securities and commodities laws as to which federal courts have exclusive jurisdiction (9a-10a).[1] By so doing, under

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1. Citations to Petitioners' Appendix are designated "a." Citations to Respondent's Appendix are designated "ra."

New York law Petitioners waived any objection they might have had to jurisdiction.

Moreover, as the Court below found, Petitioners had significant contacts with New York. They transacted substantial business in New York City, both personally and through agents. This dispute arises out of, inter alia, those transactions in New York.

Petitioners' New York dealings led to the opening of the account which is the subject of this action. To induce Respondent to extend them credit in New York, Petitioners asked Respondent to rely on Petitioners' longstanding relationship with Chase Manhattan Bank in New York City, which they provided as a credit reference. Respondent relied on this New York City banking relationship with Chase Manhattan Bank in New York and extended credit to Petitioners in New York City -- to Respondent's eventual detriment.

The trial court found that Petitioner Jose Harari had numerous contacts with New York, personally visiting it from time to time to transact business. In addition to opening their account with Respondent, Petitioners personally came to New York City to open a securities account with a New York City office of Merrill Lynch, Pierce, Fenner & Smith and Jose Harari came to New York City to open a deposit account with Citibank (9a).

During the time they maintained their account with Respondent, Petitioners required credit to be advanced to them in New York City by Respondent for purchase of securities and commodity futures contracts through Respondent on exchanges located in New York City.

Even after Petitioners' account was liquidated, Petitioners proposed using their

assets in New York City to satisfy their obligations to Respondent. As the trial court found, "at a meeting held January 31, 1980 in Mexico City, Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York" in the principal amount of $156,000.00 as "collateral" for Petitioners' obligation to Respondent (14a, emphasis added). This action was commenced in February 1980 by attachment of that certificate of deposit.

SUMMARY OF ARGUMENT

Granting a writ of certiorari in this case would violate this Court's long-standing rule that it will not review a state court decision which is based on an adequate and independent state ground. The trial court in this case found that under New York law Petitioners waived their objections to personal jurisdiction by asserting affirmatively, through trial, counterclaims which they were not obligated to litigate. Under longstanding New York law, by voluntarily invoking the jurisdiction of the New York courts, Petitioners were subject to in personam jurisdiction regardless of whether there were minimum contacts sufficient to satisfy International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Even from the Petition it is clear that this case does not raise novel issues of

law or policy. This case involves the application to a complex factual situation of well-settled standards of personal jurisdiction enunciated by this Court. Granting a writ of certiorari would therefore involve this Court in a detailed factual evaluation which would be relevant only to the litigants in this case and of no practical value to anyone else.

Finally, a writ of certiorari should not be granted because no error was committed by the trial court, which correctly applied the minimum contacts test as enunciated by this Court. The trial court found that Petitioners had a wide range of contacts with New York, which were related to the disputed transactions. These contacts were found by the courts below to be sufficient to satisfy the due process clause.

I

THE COURT SHOULD NOT REVIEW THIS CASE AS REVERSAL WOULD NOT CHANGE THE RESULT BELOW. THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR JURISDICTION IN NEW YORK

The courts below found on the basis of uncontroverted facts that Petitioners subjected themselves to personal jurisdiction in New York by affirmatively using New York as a forum for litigating their claims against Respondent (9a-10a). The trial court wrote that this fact "disposes of the question of jurisdiction" (10a).

By voluntarily subjecting themselves to the New York courts to try their claims against Respondent, Petitioners waived any objection to the personal jurisdiction of New York courts. Petitioners' affirmative use of the New York courts creates an adequate and independent state ground to support the result below.

This Court should not review the decisions below because the state common-law waiver ground would sustain that decision regardless of any error by the courts below on the constitutional question.[2] Thus, any decision by the Court on the federal constitutional question would be advisory and would not change the result below.

This Court consistently and repeatedly has refused to exercise jurisdiction to review cases in which the decision rests upon an adequate and independent state ground. Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469, 3474-78 (1983); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Abrie State Bank v. Bryan, 282 U.S. 765, 773-75 (1931):

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2. The New York Court of Appeals dismissed Petitioners' attempted appeal as of right to that court on the ground that "no substantial constitutional question is directly involved" (2a).

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, ____ U.S. at ___, 103 S. Ct. at 3475.

Here, the state court decision indicates clearly and expressly that it is alternatively based on the separate and independent state law ground of waiver. This Court should not undertake a review of that decision. The common law ground of waiver by voluntary submission to New York State court jurisdiction is well-established in New York jurisprudence (and not challenged by Petitioners). Flaks, Zaslow & Co. v. Bank Computer Network Corp., 66 A.D.2d 363, 366-67, 413 N.Y.S.2d 1, 3 (1st Dep't 1979) (By availing itself of New York court for affirmative relief, defendant waived its objection to personal jurisdiction); Biener v.

Hystron Fabrics, Inc., 78 A.D.2d 162, 166, 434 N.Y.S.2d 343, 346 (1st Dep't 1980) (Defendant who uses New York court as his own jurisdictional forum waives his objection to personal jurisdiction); Revona Realty Corp. v. Wasserman, 4 A.D.2d 444, 448, 166 N.Y.S.2d 960, 964-65 (3rd Dep't 1957), appeal denied, 8 A.D.2d 666, 185 N.Y.S.2d 792 (3rd Dep't 1959) ("To the extent that defendant sought affirmative relief by an order . . . directing a trial on the merits," defendant waived any objection to personal jurisdiction); Fox v. Montenegro, 61 Misc.2d 1, 4, 304 N.Y.S.2d 624, 627 (Civ. Ct. Kings 1969), aff'd, 63 Misc.2d 242, 312 N.Y.S.2d 744 (App. Term, 2d Dep't 1970) ("A defendant cannot deny jurisdiction over his person and at the same time urge merits"); Gundersheim v. Kurcer, 28 Misc.2d 463, 465, 213 N.Y.S.2d 346, 348 (Sup. Ct. Queens 1961) (same).

Personal jurisdiction based on waiver of any objection thereto is independent of the "minimum contacts" federal requirement. Under New York law such a waiver supports a finding of personal jurisdiction even in the absence of "minimum contacts." In Flaks, Zaslow & Co. v. Bank Computer Network Corp., supra, the Appellate Division held that by moving for summary judgment on its counterclaim, defendant waived its objection to personal jurisdiction despite an earlier finding that there were insufficient contacts with New York to justify the Court's jurisdiction over defendant. 66 A.D.2d at 366-67, 413 N.Y.S.2d at 3. In Biener v. Hystron Fabrics, Inc., supra, the same Court wrote: "Where a defendant evinces an intention to make the court his own forum, he waives the jurisdictional objection even though it has been pleaded." 78 A.D.2d at 166, 434 N.Y.S.2d at 346.

There is no requirement in New York practice that counterclaims, even if related to the main claim, be asserted in the same action. See New York Civil Practice Law and Rules ("CPLR") 3019(a); contrast Fed. R. Civ. P. 13(a). Petitioners were free to sue Respondent in Mexico or Texas but chose instead to counter-sue in New York and press those claims to trial. Indeed, that the trial below required sixteen days (8a) is primarily attributable to the trial of Petitioners' affirmative claims, which Petitioners vigorously pressed.[3]

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3. Petitioners belatedly and unsuccessfully sought leave to commence a new action in federal court for the Southern District of New York. Since the federal courts had exclusive subject matter jurisdiction over certain of Petitioners' counterclaims, those claims could have been brought in any federal court having jurisdiction over Respondent. Instead, Petitioners sought to assert those claims as plaintiffs in the federal district court in New York:

(footnote cont'd)

Petitioners' prosecution of their counterclaims for affirmative relief against Respondent in the New York State trial court and their request for removal to federal court in New York to prosecute their federal claims are conclusive evidence of their submission to personal jurisdiction of the New York courts. Those acts constituted a knowing waiver of any jurisdictional objection, as the trial court found (8a-10a), independent of the "minimum contacts" and "doing business" tests for the assertion of

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(footnote 3 cont'd)

> "[W]e are prepared to accept [as] a condition [of dismissal of Respondent's action] that within 30 days after the entry of an order granting dismissal, the Defendants [Petitioners] will institute an action in the Federal District Court for the Southern District of New York against the Plaintiff [Respondent]." Affirmation of Arnold S. Schickler dated 2/13/81 at 14 (2ra); emphasis added.

personal jurisdiction over Petitioners under CPLR 302(a)(1).

Petitioners' consent to jurisdiction cannot now be revoked because they are dissatisfied with the result in the courts below. That consent is an adequate and independent ground for sustaining the decisions below, and this Court accordingly should not review those decisions.

II

THE DECISIONS BELOW SHOULD NOT BE REVIEWED BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING REVIEW

This Court should not exercise its discretion to review the decisions below where, as here, there are no "special and important reasons" for granting a writ of certiorari.

Petitioners purport to find a conflict between the holding of this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and the decisions of the courts below. Petitioners contend that there was no connection between Respondent's cause of action (the deficit balance in Petitioners' account) and Petitioners' activities in New York because: (i) while the speculations in Petitioners' accounts occurred on the New York Commodity Exchange,

Petitioners did not request that those speculations occur in New York; and (ii) Petitioners maintained supposedly unrelated and limited bank accounts in New York (Petition for Writ of Certiorari ("Pet.") at 17).

The alleged conflict does not exist and Petitioners' contentions are in error (see III below). The decisions below involved the application of the well-settled legal doctrine of "minimum contacts" to the particular facts of this action (Pet. at 8-9; 8a-10a). As Petitioners concede (Pet. at 16):

> "Necessarily decisions relating to the appropriate application of sufficient contacts intertwine findings of fact on an ad hoc basis. This is not usually appropriate matter for review by this Court in the exercise of its discretion . . . ."

Petitioners point to no conflict between the decisions below and those of any federal court of appeals or other state court of last resort (Supreme Court Rule 17.1(b)). Nor do Petitioners suggest that the decisions below involve a unique question of federal law that should be settled by this Court or decide a federal question in a way in conflict with applicable decisions of this Court (Supreme Court Rule 17.1(c)).

Instead, pointing to the particular facts of this case (Pet. at 17), Petitioners argue that: (i) in applying the facts of this case to New York decisional law, "[t]he courts of New York have strayed from their previous decisions interpreting the N.Y. CPLR §§ 301 and 302" (Pet. at 26); and (ii) the facts of this case should result in a different decision under International Shoe Co. v. Washington, 326 U.S. 310 (1945) (Pet. at 26).

Petitioners' first argument does not raise any "special and important reasons" for this Court to grant certiorari, since the province of this Court is not to resolve conflicts within a particular state's jurisprudence. Here the New York Court of Appeals dismissed Petitioners' attempted appeal as of right on the ground that "no substantial constitutional question is directly involved" (2a). Subsequently the same court denied Petitioners' motion for leave to appeal (1a).

With respect to Petitioners' second argument, it is not appropriate for this Court to review the minutiae of factual disputes. This is not an extreme or unusual case on its facts; accepting Petitioners' assertions at their strongest, this case turns on the trial court's evaluation of voluminous documentary and testimonial evidence.

Accordingly, neither ground advanced by Petitioners supports the granting of a writ of certiorari.[4]

Supreme Court Rule 17.1 (formerly Rule 19), formulated almost 60 years ago, embodies the salutary policy that the Court has a limited reviewing function and that there is a vital interest in the sound management

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4. Contrary to Petitioners' argument that the assertion of personal jurisdiction by the court below "has a potentially national and international scope in that New York, in particular, is a center of international finance, banking and securities trading" (Pet. at 26), New York courts traditionally have held that because New York is the center of international finance, upholding jurisdiction is appropriate. Majique Fashions, Ltd. v. Warwick & Co., 67 A.D.2d 321, 414 N.Y.S.2d 916 (1st Dep't 1979); Bache Halsey Stuart Shields Incorporated v. Gantt, N.Y.L.J., October 29, 1979 at 7 (N.Y. Sup. Ct., Index No. 9182/79); Bache Halsey Stuart Shields Incorporated v. Klitzman, N.Y.L.J., June 5, 1980 at 12 (N.Y. Sup. Ct., Index No. 20311/79); Drexel Burnham Lambert Inc. v. D'Angelo, 453 F. Supp. 1294 (S.D.N.Y. 1978).

of scarce federal judicial resources. Justice Frankfurter articulated the reasons for limiting the Court's review to cases that are "special and important," writing that the Court does not (and, indeed, cannot) sit for the benefit of private litigants or for the resolution of cases presenting academic or episodic questions. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955).

Petitioners seek to involve the Court here in the review of the adequacy of the factual findings below to decide, as Petitioners concede, a case on an ad hoc or "episodic" basis. This is an inappropriate basis for review.

III

THE COURTS BELOW CORRECTLY FOUND THAT PETITIONERS HAD SUFFICIENT CONTACTS FOR NEW YORK COURTS TO ASSERT PERSONAL JURISDICTION OVER PETITIONERS

The trial court's decision correctly found the contacts between Petitioners and New York to be sufficient in this case to satisfy the due process requirements of International Shoe Co. v. Washington, 326 U.S. 310 (1945). The trial court found on the basis of the facts in the record that Petitioner had transacted business in New York with relation to the matter in dispute.

This finding clearly was correct. As the trial court wrote, summarizing the undisputed evidence with respect to Petitioners' contacts with New York:

> "The facts indicate that [Petitioners] had various securities and commodities dealings with [Respondent] in New York over a significant period of time. Furthermore, [Petitioners] agreed

that with respect to their accounts that they would be 'governed by the laws of the State of New York.'

"As a basis for securing credit from [Respondent], [Petitioners] referred [Respondent] to their business relationship which they had maintained for some time with the Chase Manhattan Bank [in New York].

"Harari, in addition, stated that he had come to New York at various times to conduct several financial undertakings. Apparently the other [Petitioners] visited New York City in 1979 to open an account with the brokerage firm of Merrill Lynch, Pierce, Fenner & Smith. Harari also opened an account with Citibank in New York City, consisting of a checking account and a Certificate of Deposit in excess of $100,000.00. ...

"...Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York as collateral for payment [to Respondent]." (9a, 14a)

Petitioners do not dispute the facts evidencing their transaction of business in New York. Instead, Petitioners argue that none of those contacts by itself would

satisfy the "minimum contacts" test. (Pet. at 17-25) Petitioners' argument erroneously focuses attention on individual contacts rather than the totality of Petitioners' contacts with New York.[5] Here Petitioners'

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5. In making a similar argument below, Petitioners' own brief to the Appellate Division contained additional admissions of contacts with New York related to this action, including

(i) ". . . that the monthly statements were prepared in New York and mailed directly to the Hararis. . ." (4ra-5ra);

(ii) ". . . that the margin loans for securing trading in the Hararis' account were arranged through the New York office . . ." (5ra);

(iii) that the Hararis maintained three bank accounts "at Chase Manhattan Bank [in New York City]" (6ra);

(iv) ". . . that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit" (7ra); and

(v) "that in September of 1979 [Jose Harari] opened a securities account in New York City with Merrill Lynch, Pierce, Fenner & Smith" (id.).

contacts with New York, as found by the trial court, were purposeful and plentiful.

Moreover, those contacts were directly related to this dispute, thus subjecting Petitioners to in personam jurisdiction under CPLR 302(a)(1). Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, cert. denied, 382 U.S. 905 (1965) (nondomiciliary defendant held subject to in personam jurisdiction where he performed "purposeful acts . . . in relation to the contract" and the exercise of jurisdiction held constitutional under International Shoe and its progeny); Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 586, 347 N.Y.S.2d 47, 49 (1973) (in accord with International Shoe, nondomiciliary third party defendant held subject to in personam jurisdiction regardless of whether actually present in New York, because the New York

connections of the contract alone were sufficient).

In a case similar to this one, a New Jersey defendant who purposefully traded on New York stock exchanges through plaintiff, a brokerage house, was held to have transacted business in New York pursuant to CPLR 302(a)(1) and was held subject to a New York court's in personam jurisdiction as to plaintiff's claim for a deficit in defendant's account. Francis I. duPont & Co. v. Chelednik, 69 Misc.2d 362, 330 N.Y.S.2d 149 (App. Term, 1st Dep't 1971). The court wrote:

> "[O]peration of the account in New York constituted the transaction of business in New York. One need not be physically present in New York to be subject to the jurisdiction of our courts under CPLR 302. One 'can engage in extensive purposeful activity here without ever actually setting foot in the State.' (Parke-Bernet

> Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 17, 308 N.Y.S.2d 337, 340, 256 N.E.2d 506, 508)." 69 Misc.2d at 363, 330 N.Y.S.2d at 150 (emphasis added).

The trial court considered all relevant evidence concerning Petitioners' contacts with New York and, consistent with International Shoe Co. v. Washington, supra, found sufficient contacts to support personal jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Petititoners' petition for a writ of certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York.

Dated: New York, New York
January 23, 1984

Respectfully submitted,

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APPENDIX

Pages 14-15 of Affirmation of
Arnold S. Schickler, dated 2/13/81

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Finally, with regard to CPLR 327 and our application for alternative relief thereunder, the following observations should be made. Our requests for dismissal on condition under this Section of law are made in good faith and with practical legal reasoning. By no means have we attempted to "fool" the Court as is alleged in paragraph 4 of the Miller affidavit and other places therein. To the contrary, we indicated to the Court the basis for granting the relief under this Section of law. We now note that the major objection and opposition advanced by Plaintiff as to the Court granting relief under this Section of law, is that it may lose its attachment and jurisdiction over the Defendants. The Defendants are prepared to accept as a condition of a dismissal under this

Section that the attachment and jurisdiction shall continue as it existed in this action. Further, to obviate the claims of an attempt to delay, we are prepared to accept a condition that within 30 days after the entry of an order granting dismissal, the Defendants will institute an action in the Federal District Court for the Southern District of New York against the Plaintiff. Obviously, the Court, should it grant relief under this Section, can impose all appropriate conditions so as to insure that neither party has an opportunity to take advantage of the other.

Throughout the Miller affidavit and their Memoranda of Law, through the use of language, the attempt is made to leave the impression that some matters are disputed and some are not, that representations were made and the like. I wish to reiterate that by

failing at this time to handle, by chapter and verse, each and every statement of the Plaintiff in their papers, we by no means admit or concede the same. In point of fact, the only items with regard to Plaintiff's motion to which we concede are that the first affirmative defense and sixteenth counterclaim in Defendants' original answer are insufficient.

WHEREFORE, it is respectfully requested that Plaintiff's motion be in all respects denied and Defendants' cross-motion be in all respects granted.

Dated: New York, New York
February 13, 1981

S/_____
ARNOLD S. SCHICKLER

Pages 21-24 of Petitioners' Brief to the Appellate Division, First Department of the Supreme Court of the State of New York

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Despite the foregoing facts, it is respectfully submitted that the trial court erred in holding that the court had in personam jurisdiction over the defendants. From the evidence adduced at trial, it is uncontroverted that all of the contacts between the Hararis and Bache were at Bache's office in San Antonio, Texas. Furthermore, the record is void with respect to there ever having been any telephone calls between the Hararis and Bache's office in New York, or with there having been any personal visits by any of the Hararis to any Bache office in New York. In fact the only connection whatsoever between the Hararis, Bache and New York was that the monthly statements were prepared in New York and mailed directly to the Hararis

in Mexico (A-208) (although the confirmation slips for individual transactions were sent out from the San Antonio office (A-209)), that the margin loans for securing trading in the Hararis' account were arranged through the New York office (A-206), and that Bache had selected the New York COMEX for the execution of the Hararis' orders (A-299).

With respect to the last factor, that Bache had selected the New York COMEX for the execution of the Hararis' orders, it is most significant to note that when the Hararis opened their account with Bache there was no discussion as to where or on what exchanges stocks and commodities were to be traded (A-298); that the Hararis never directed that any of their futures contracts be purchased on the New York COMEX; and that Bache was at all times free to execute any orders on the New York COMEX, the Chicago

Commodities Exchange, the London Exchange, or any other exchange in which the Hararis' orders could be executed.

With respect to any bank accounts maintained by the Hararis in New York, the testimony at trial revealed that on May 20, 1975 a time deposit account was opened at Chase Manhattan Bank in the names of Jose and/or Salvador Harari, a savings account was opened in the name of Jose and/or Renee Harari on April 29, 1977, and a checking account was opened in the names of Jose and Salvador Harari on May 20, 1975 (A-229-230). With respect to the time deposit account at Chase Manhattan Bank, it should be noted that it was opened with a $100,000 deposit but that there were no additional principal deposits made after the account was first opened on May 20, 1975 (A-231-232). The savings account referred to above was opened with a $3,100 deposit on April 29, 1977 and

no additional deposits were made (A-232-233). The initial deposit for the checking account in May of 1975 was $1,000 and there were either no other deposits made or one other small deposit made into that account (A-234).

The evidence also reveals conclusively that the Hararis were Mexican citizens who had never lived in any other country (A-300). With respect to the period of time during which the Bache account was maintained, between May of 1978 and February of 1980, the only connections between the Hararis and New York were the bank accounts referred to previously, that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit, and that in September of 1979 he opened a securities account in New York with Merrill, Lynch, Pierce, Fenner & Smith (A-339-44).

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